UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CDS, INC.,	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 15-148M
	:	
KARNDEAN INTERNATIONAL, LLC,	:	
d/b/a KARNDEAN DESIGNFLOORING,	:	
Defendant.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

This matter is before the Court on the motion (ECF No. 22) of Defendant Karndean International, LLC, d/b/a Karndean Designflooring ("Karndean") for summary judgment on all four Counts of the Amended Complaint (ECF No. 14) brought by Plaintiff CDS, Inc. ("CDS"), arising from the 2014 termination by Karndean of its distribution relationship with CDS. Karndean also asks the Court to enter judgment on its counterclaim for breach of contract and unjust enrichment based on goods sold and delivered for which CDS failed to pay (ECF No. 15 at 6); Karndean claims it is owed $181,995, plus interest and attorneys' fees.

CDS alleges that Karndean's business decision to stop selling its flooring products to CDS and instead to sell directly to retail customers in the New England territory formerly served by CDS tortiously interfered with CDS's relationships with those customers (Count I), was deceptive and unfair in violation of Massachusetts Gen. Laws ch. 93A, § 11 ("Massachusetts chapter 93A") (Count II), unjustly enriched Karndean (Count III) and breached Karndean's fiduciary duty to CDS (Count IV). For the reasons that follow, I recommend that Karndean's

motion be granted as to all four Counts. I further recommend that Karndean's motion for summary judgment on its counterclaims be granted in part and denied in part.

I. BACKGROUND[1]

CDS is a Rhode Island corporation with offices in Lincoln, Rhode Island. K-SUF ¶ 3. Incorporated in 1991, CDS began as a distributor of carpet cushion and other flooring materials and expanded to distributing a variety of flooring materials to commercial and retail customers throughout New England. K-SUF ¶¶ 1-2. Karndean, a Delaware company based in Pennsylvania and registered to do business in Rhode Island, is an importer of floor tiles and other flooring materials with a focus on the sale of luxury vinyl tiles. Second Am. Compl. ¶ 2; K-SUF ¶¶ 7, 8; C-SDF ¶ 7. In June 2002, Karndean and CDS entered into a written distribution agreement pursuant to which CDS was to purchase certain Karndean products for resale in New England. K-SUF ¶ 12. In April 2006, Karndean and CDS executed a new Distributor Agreement, which terminated the 2002 agreement and provided for the sale of an expanded set of Karndean products to CDS for resale in New England ("2006 Distributor Agreement"). K-SUF ¶ 13.

As one witness candidly testified, the parties are unsure whether the 2006 Distributor Agreement was ever properly terminated. C-SDF ¶ 15. However, as Karndean points out, and CDS does not dispute, by 2008, Karndean's chief executive officer wrote an email to CDS's vice president confirming that Karndean did not "currently have a signed contract with CDS." K-

[1] These facts are drawn from the Second Amended Complaint (ECF No. 14), as well as the parties' factual statements filed as required by DRI LR Cv 56. CDS's Statements of Undisputed and Disputed Facts are referred to as "C-SUF" (ECF No. 30-3) and "C-SDF" (ECF No. 30-2). Karndean's Statements of Undisputed and Disputed Facts are referred to a "K-SUF" (ECF No. 24-1) and K-SDF" (ECF No. 31-2). Except as noted in the text, the facts recited above are undisputed. Virtually all documents filed by the parties in this matter were filed under seal. On March 7, 2017, this Court entered an Order to show cause why the parties' disputed and undisputed facts could not be unsealed so that that they could be cited in this R & R. No objection was made by either party as of the date specified in the Order, March 13, 2017. All documents presented as exhibits to the disputed and undisputed facts remain under seal.

SUF ¶ 15. CDS does not dispute that this communication was received and does not assert that the email is inaccurate. C-SDF ¶ 15. More importantly, neither party argues that any of the terms of the 2006 Distribution Agreement controls any aspect of this motion for summary judgment.[2] After the lapse of the 2006 Distribution Agreement, Karndean sent CDS copies of its standard terms and conditions in 2008 and again in 2009 ("Terms and Conditions"). These Terms and Conditions provide for interest on unpaid amounts and the recovery by Karndean from CDS of any attorney's fees expended to collect for products purchased. K-SUF ¶ 18 (ECF No. 25-23 at 81, 84 §§ 5.7, 5.9; ECF No. 25-23 at 99, 102 §§ 5.7 5.9). CDS disputes that it ever agreed to accept any of these Terms and Conditions. C-SDF ¶¶ 17-18. Karndean's evidence establishes only that CDS received them; it is ambiguous regarding whether CDS accepted them. K-SUF ¶ 17.

Over the years from 2002 until Karndean stopped selling to CDS in late 2014, CDS ordered tiles from Karndean for resale in New England with shipment either to CDS's Lincoln, Rhode Island, warehouse or directly to the customer. K-SUF ¶ 20. After shipment, Karndean issued an invoice to CDS, which CDS was required to pay within a grace period that shrank from 120, to sixty, then to thirty, days over the course of the relationship. C-SUF ¶ 80. Karndean's chief executive officer testified that he considered the relationship between CDS and Karndean to be like a partnership. C-SUF ¶ 74. Karndean and CDS exchanged confidential information with each other. C-SUF ¶ 76.

Throughout the distribution relationship with CDS, Karndean offered a rebate program to encourage its distributors to buy so-called "point of sale (POS) and marketing materials" – primarily customized display cases to be placed at retail stores. K-SUF ¶ 29. At the beginning

[2] If the Agreement did control this dispute, it would have been transferred to the Western District of Pennsylvania, pursuant to the clause calling for exclusive jurisdiction over any disputes in that venue or in the analogous state court. K-SUF ¶ 13 (ECF No. 25-23 at 67, 73 § 16).

of the CDS relationship with Karndean, the rebate program was more generous in that it applied a 5% discount to invoices and was not limited to the purchase of display cases. C-SDF ¶ 29. By 2010, the rebate program was rolled back to a three percent rebate, which could only be used to buy display cases from Karndean. C-SDF ¶ 29; K-SUF ¶ 30. After it purchased the displays under the rebate program, CDS placed them with its customers, some of which paid CDS a partial or discounted amount for the display. K-SUF ¶ 36. Karndean was not involved with what happened to the display cases after they were sold to CDS; the parties do not dispute that Karndean had, and has, no right to remove a display from a retailer that purchased or received it from CDS. K-SUF ¶¶ 33, 34, 36.

Also during the pendency of the relationship, Karndean assigned two of its Massachusetts-based sales representatives to help CDS with sales throughout New England. K-SUF ¶ 27, 28; C-SDF ¶ 27. Karndean claims it offered this assistance to support CDS in selling the product. These representatives made joint sales calls with CDS on customers for Karndean products, throughout New England, including in Massachusetts. C-SUF ¶ 77. While CDS does not dispute that these sales representatives were assigned to assist it throughout the pendency of the relationship, once things got rocky, CDS characterizes the representatives as a kind of Trojan Horse, "purportedly provided to support CDS in selling Karndean product, [but] later revealed that this became a ploy to take over CDS's customers." C-SDF ¶ 27. For example, it points out that these Karndean sales representatives asked for and received copies of CDS's customer lists and related sales information. C-SUF ¶ 75.

While the parties dispute the details and the reasons, CDS and Karndean do not dispute that, beginning in approximately 2011, their relationship was fraying. For starters, since 2007, Karndean had been reducing the number of distributors to which it sold nationally; CDS believes

(and Karndean disputes) that this was part of an effort to sell directly to its retail dealers. C-SUF ¶¶ 71, 73. By 2011, CDS was aware that its relationship with Karndean was souring in that Karndean had stopped sending CDS leads for the territory. C-SUF ¶ 70. By November 2011, Karndean had come to believe that CDS's sales were disappointing by comparison with sales growth in other parts of the country and were below its expectations for New England.[3] In addition, Karndean was increasingly frustrated with CDS's confusion over the new rebate program,[4] as well as with its persistent failure to pay invoices promptly[5] which had resulted in an overdue balance of over $230,000. K-SUF ¶¶ 38-46. Based on these concerns, Karndean claims that it began consideration of terminating or changing the relationship. CDS disputes or quibbles with Karndean's stated reasons[6] for considering an alteration to the relationship and argues that the decision was really part of a nationwide strategy to eliminate distributors:

[3] CDS disputes that it was underperforming in terms of sales. It claims it met Karndean's sales goals every year (except one), resulting in a 395% increase in sales over a five-year period. C-SDF ¶ 40; C-SUF ¶ 69. While CDS concedes being told at least once it needed to improve its sales, it claims it responded with improved sales. C-SUF ¶ 69 (citing Thompson Dep. at 28). Somewhat inconsistently, CDS also justifies what Karndean's chief executive officer labeled as "below par" sales for the northeast region by arguing that Karndean's "market analysis for New England was based on crude census figures about households and income and grossly inaccurate statistics related to the flooring industry." C-SUF ¶ 87 (citing Perrin Dep. at 22). As Karndean points out, CDS cites no evidence to support that derogatory characterization of Karndean's basis for its sales expectations for New England.

[4] CDS claims that its confusion was Karndean's fault in that the new rebate program was imposed without adequate explanation. C-SDF ¶ 41.

[5] CDS does not dispute that it was seriously and persistently in arrears and that Karndean was frustrated by its failure to pay down a significant past due debt. K-SUF ¶¶ 43-45. Instead, CDS blames its financial difficulties on Karndean. For example, it claims its profit margins were adversely affected by the change to the rebate program and "the pricing book that Karndean required CDS to use." C-SDF ¶ 44; C-SUF ¶ 68. In addition, as CDS fell behind in its payments and its credit line was frozen, Karndean made its problems worse by delaying and withholding shipments; in one instance, CDS's owner had to charge $23,000 on his personal credit card in order to fulfill a customer's order. C-SUF ¶¶ 81-84.

[6] CDS denigrates Karndean's reasons for dissatisfaction with CDS as a "pretext," presumably to cover up its nationwide plan to eliminate distributors. C-SDF ¶ 39. However, the evidence CDS cites in support of that assertion does not establish that Karndean's stated concerns about CDS were pretextual. Rather, CDS's evidence is consistent with Karndean's increasing frustration as the reasons for making a change with its distribution strategy in New England piled up. See nn. 3-5 *supra*. For example, CDS does not dispute its serious problems with making timely payments for product or its confusion over the rebate program, while the evidence it proffers makes clear that these were very serious matters for Karndean. Nevertheless, for purposes of this motion, I accept that there is a

> In approximately November 2011 as a result of Karndean's strategy to eliminate and leapfrog its distributors to sell directly to retail dealers Karndean first began secretly terminating or transitioning its relationship with CDS by ending referral, hiring new Massachusetts representatives, squeezing credit terms, acquiring customer lists and information, imposing price restrictions and new display terms.

C-SDF ¶ 38. The parties do not dispute that, during the period from late 2011 through the summer of 2014, while Karndean was considering changing or terminating its relationship with CDS, it did not tell CDS that the business relationship was in jeopardy. K-SUF ¶ 38; C-SDF ¶ 38.

In June 2014, Karndean finally made its decision – it decided not to terminate CDS, but to move it "out of its core ranges" of product, while allowing it to continue to sell a different product. K-SUF ¶ 47. On August 28, 2014, a Karndean vice president met with CDS in Rhode Island and informed it that Karndean had decided to sell its luxury tile line directly in New England as of January 2015, but was prepared to offer CDS the opportunity to sell another Karndean product. K-SUF ¶ 48. Karndean followed up with a written proposal for the transition, including details about the new product line, the return of Karndean inventory and the settlement of unpaid invoices and open rebates. K-SUF ¶ 49. In mid-October 2014, CDS rejected the proposal, ending the relationship.[7] K-SUF ¶ 50. In the following months, CDS returned Karndean product and established a relationship with a new supplier, although the sales volume is a fraction of its sales of Karndean products. C-SUF ¶ 94; C-SDF ¶ 52.

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factual dispute regarding whether part or all of Karndean's motivation was to implement a nationwide plan to eliminate distributors almost entirely.

[7] In argument, CDS adverts to the termination clause in the lapsed 2006 Distribution Agreement, hinting that it somehow gives rise to a trial-worthy issue on the period of notice to which CDS was entitled in that the clause required written notice thirty days prior to the expiration of successive one-year terms (ending on April 24 in each year). Even if applicable, that termination clause is rendered feckless by CDS's decision to end the relationship immediately rather than invoking whatever contractual right to a longer notice period arguably arose under the 2006 Distribution Agreement.

Net of payments and credit for earned rebates, it is undisputed that the total CDS owed Karndean for product sold and delivered as of the date this litigation was initiated is $181,995. K-SUF ¶¶ 54, 55. CDS concedes that it "refused to pay outstanding invoices in the amount of $181,995 after Karndean wrongfully terminated CDS." C-SDF ¶ 25. It justifies the refusal to pay for two substantiated[8] reasons: first, it alleges that Karndean now benefits from the display cases sold by CDS to its customers, which are being used to display product sold by Karndean;[9] and second, it alleges that Karndean failed to compensate it for sales in the pipeline at the very end of the business relationship, where the order was taken by CDS but the sale was closed by Karndean. C-SDF ¶ 25; C-SUF ¶¶ 95, 105.

In addition to its belief that it should be compensated for display cases and sales in the pipeline, CDS seeks to hold Karndean responsible for the financial impact of the termination of the distribution relationship:

> The transition interfered with CDS's customers and caused CDS to lose its net investments in Karndean displays. CDS lost profits of over $700,000 in addition to approximately $250,000 in 2014 and over $30,000 in 2015 which its owner personally injected into the business to meet payroll and overhead obligations because Karndean's actions prior to termination destroyed CDS's profitability.

C-SUF ¶¶ 95-96. According to CDS, all of this was part of a secret "plan to eliminate distributors where practical and by animus toward CDS" hatched by Karndean and executed over a period of years to induce CDS to buy Karndean products and to share its proprietary trade secrets with Karndean so as to enable Karndean to take over CDS's customer network. C-SUF ¶¶ 97, 106. Karndean disagrees, asserting that it proposed the altered relationship with CDS

[8] CDS argues that there is a third reason – that Karndean failed to compensate it for all of its earned rebates. It cites no evidence to support this assertion. Karndean has sustained its burden of presenting admissible evidence that the balance for which it is suing is net of the earned rebates; CDS presented nothing to dispute this fact. K-SUF ¶ 54 (Keller Decl. ¶ 14). CDS's argument about earned rebates will not be considered further.

[9] CDS claims this amounts to $228,000. C-SDF ¶ 25.

based on its disappointment with CDS's sales and product promotion and its frustration with the debt and the misunderstandings about the rebate program. K-SDF ¶ 106.

II. STANDARD OF REVIEW

Under Fed. R. Civ. P. 56, summary judgment is appropriate if the pleadings, the discovery, disclosure materials and any affidavits show that there is "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Taylor v. Am. Chemistry Council, 576 F.3d 16, 24 (1st Cir. 2009); Commercial Union Ins. Co. v. Pesante, 459 F.3d 34, 37 (1st Cir. 2006) (quoting Fed. R. Civ. P. 56(c)). A fact is material only if it possesses the capacity to sway the outcome of the litigation; a dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. Estrada v. Rhode Island, 594 F.3d 56, 62 (1st Cir. 2010). The evidence must be in a form that permits the court to conclude that it will be admissible at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). "[E]vidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve." Medina-Monoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990)). In ruling on a motion for summary judgment, the court must examine the record evidence in the light most favorable to the nonmoving party; the court must not weigh the evidence and reach factual inferences contrary to the opposing party's competent evidence. Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014).

Except for CDS's invocation of Massachusetts's chapter 93A to support Count II, the parties agree that the law of Rhode Island controls the outcome of this motion.

III. ANALYSIS

At the core of this case lies an important and fundamental principle of federal and state law – that the seller of products like Karndean has the right to choose where and to whom to sell its products. United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (acknowledging "long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal"); Yagoozon, Inc. v. Kids Fly Safe, No. C.A. 14-040 ML, 2014 WL 3109797, at *7 (D.R.I. July 8, 2014). From Karndean's inherent entitlement to choose its own customers, including to sell through a distributor like CDS or to sell direct, springs its right to control the marketing of its products by changing its distribution structure. See Auburn News Co. v. Providence Journal Co., 659 F.2d 273, 278 (1st Cir. 1981); Phillip E. Areeda & Hebert Hovenkamp, 8 Antitrust Law: An Analysis of Antitrust Principles & Their Application ¶ 1652b (3d ed. 2013). CDS alleges that its evidence is sufficient to overcome this bedrock principle in that a fact finder could conclude that Karndean's exercise of this right actually amounted to an unscrupulous pattern of deception, whereby it extracted proprietary information about CDS's business under the guise of supporting CDS, and then abruptly terminated the relationship, taking over CDS's retail sales network.

A. Count I – Tortious Interference with Contractual and Business Relations

Count I alleges that Karndean knowingly and wrongfully interfered with CDS's long-time business and contractual relationships with the retailers in its sales territory by inducing them to stop doing business with CDS and to switch to Karndean. To state a claim for tortious inference, a plaintiff must show: "(1) the existence of a business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an intentional act of interference, (4) proof that the interference caused the harm sustained, and (5) damages to the plaintiff." Avilla v. Newport Grand Jai Alai LLC, 935 A.2d 91, 98 (R.I. 2007) (quoting

Mesolella v. City of Providence, 508 A.2d 661, 669 (R.I. 1986)). However, not all intentional interference is actionable. As the Rhode Island Supreme Court has held, "[t]he element of intentional interference requires a showing of legal malice – meaning 'an intent to do harm without justification' – or that he acted 'for an improper purpose.'" Greensleeves, Inc. v. Smiley, 68 A.3d 425, 434 (R.I. 2013); see also Mesolella, 508 A.2d at 669-70; Avilla, 935 A.2d at 98. The law has long considered normal business competition to constitute a justification for what otherwise would amount to intentional interference – "[c]onduct in furtherance of business competition is generally held to justify interference with others' contracts, so long as the conduct involves neither 'wrongful means' nor 'unlawful restraint of trade.'" Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I., 883 F.2d 1101, 1113 (1st Cir. 1989) (citing Restatement (Second) of Torts § 768 at 39 (1979)). To determine whether interference is improper, the court may consider whether there are social interests in protecting the freedom of action of the accused actor, as balanced with the contractual freedom of the plaintiff. Avilla, 935 A.2d at 98 (quoting Belliveau Building Corp. v. O'Coin, 763 A.2d 622, 628 n.3 (R.I. 2000)). Factual questions about a defendant's motive are insufficient to defeat summary judgment without a showing that there was "something illegal about the means employed." Avilla, 935 A.2d at 99.

CDS has presented no evidence to dispute Karndean's ample proffer establishing that it engaged in the legally justified actions of a business exercising its rights to choose its customers and to compete by selling its products. Put differently, aside from CDS's hyperbolic argument,[10] there is nothing tending to prove that Karndean interfered with CDS's business relationships for an improper purpose. To the contrary, CDS concedes that Karndean was within its rights to

[10] For example, CDS colorfully alleges that Karndean's actions are analogous to Putin's annexation of the Crimean Peninsula. ECF No. 30-1 at 1.

terminate the relationship with CDS and that Karndean was not prohibited from selling its products directly to CDS's customers after the termination. K-SUF ¶ 51.

CDS's argument that there is a factual dispute regarding Karndean's real motivation for ending the relationship – it relies on the factually tenuous[11] claim a fact finder could conclude Karndean had a plan to get rid of all distributors – is legally irrelevant. Unless contractually barred from doing so (and CDS makes no such argument here), the law protects Karndean's right to decide to replace a middle-man distribution network with employees on the company payroll as a legitimate and even potentially sound business decision. See, e.g., Erickson's Flooring & Supply Co., Inc. v. Tembec, Inc., 212 F. App'x 558, 566 (6th Cir. 2007) (under Michigan law, "[w]here the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference"); Serpa Corp. v. McWane, Inc., 199 F.3d 6, 15 (1st Cir. 1999) (under Massachusetts law, summary judgment proper where defendants made "legitimate business decision based on obvious efficiency concerns to eliminate one of two overlapping distributors;" evidence of "stealthy haste" insufficient to show "unlawful or improper motive"). The fact that Karndean was motivated by the goal of eliminating a distributor in order to sell its products directly is legally insufficient to support of claim of tortious inference with CDS's relationships with those customers.

CDS's facts also fail to meet the mark when examined to determine whether or not Karndean, whatever its motivation, executed its plan through the use of improper conduct or illegal means. Boyle v. Douglas Dynamics, LLC, 99 F. App'x 243, 247 (1st Cir. 2004). For

[11] CDS's claim of "animus" is stated in a conclusory fashion with no factual support beyond citation to the testimony of Karndean's chief executive officer about the trend in the number of distributors from five in 2002 to eleven in 2007, and back to five in 2014. C-SUF ¶ 71 (citing Perrin Dep. at 37). Otherwise, the evidence cited by CDS reflects Karndean's growing dissatisfaction with CDS's sales and delayed payments, including emails and testimony confirming those frustrations. K-SDF ¶ 106. This proffer confirms Karndean's statement of reasons; it does not support CDS's claim of some wrongful animus.

example, CDS argues that a fact finder could infer that Karndean's true reason for assigning two representatives to support CDS's sales efforts was to infiltrate its organization. C-SDF ¶ 38. However, even if such an inference could be pulled from the proffered facts, it is not material in that it does not matter whether Karndean was trying to learn about CDS's business not just to support it but also to supplant it, as long as the methods used by its representatives were not wrongful. Relatedly, there is no evidence to establish that Karndean had a duty to apprise CDS that it was considering a nationwide or New England-specific change in its strategy for product distribution, even if that strategy might adversely affect CDS. New England Surfaces v. E.I. Du Pont de Nemours & Co., 517 F. Supp. 2d 466, 492 (D. Me. 2007) (claim that seller withheld disclosure of decision that distributor to be terminated not actionable without evidence of special relationship creating duty to disclose), rev'd in part on other grounds, 546 F.3d 1 (1st Cir. 2008); RGJ Assocs., Inc. v. Stainsafe, Inc., 338 F. Supp. 2d 215, 245 n.12 (D. Mass. 2004) (in absence of termination provision in distribution agreement, nothing untoward in switching distributers nor did seller have a duty to disclose negotiations with substitute distributor); Abernathy-Thomas Eng'g Co. v. Pall Corp., 103 F. Supp. 2d 582, 609 (E.D.N.Y. 2000) (no duty to disclose intent to terminate distribution agreement beyond contractual duty to give thirty-days' notice). Nor is there any evidence suggesting that Karndean's insistence from time to time that CDS provide its sales representatives with a copy of its customer list was somehow wrongful; rather, it is undisputed that the parties shared confidential information with each other and that no agreement barred Karndean from using the CDS customer list, as long as it was not given to a third party. See Bruno Int'l Ltd. v. Vicor Corp., No. C.A. 14-10037-DPW, 2015 WL 5447652, at *6 (D. Mass. Sept. 16, 2015) (not actionable for seller to use terminated distributor's customer list to improve sales). Likewise, Karndean's actions are not made wrongful if, as CDS claims, it "knew

that termination of CDS could put the distributor out of business." C-SUF ¶ 86. No company is required to maintain a business relationship with another company out of a charitable concern for the other's bottom line. As the Sixth Circuit held in Erickson's Flooring, the termination of a distributor relationship is no more than "quintessential business maneuvering," and, "[w]hile such maneuvering is inevitably painful for a losing party, it is not actionable." 212 F. App'x at 556.

"As part of the free enterprise system," the law permits parties like Karndean and CDS to define by contract the scope of their rights and obligations to each other; here, Karndean engaged in business practices that did not transgress any contractual duty that it owed to CDS. Aisenberg v. Hallmark Mktg. Corp., 337 F. Supp. 2d 257, 263 (D. Mass. 2004). The evidence permits the inference only that Karndean made the legally-protected and contractually-permissible decision to materially alter its relationship with CDS by selling its luxury vinyl tile products directly in the New England territory; there is no evidence that its execution of that intent involved either improper conduct or illegal means.

Based on the foregoing, I find that CDS has failed to present evidence sufficient to permit a fact finder to determine that Karndean wrongfully interfered with CDS's relationship with its customers when it sold Karndean products to them after it stopped selling those products to CDS. Accordingly, I recommend that the Court enter judgment against CDS on Count I of its Second Amended Complaint.

B. Count II – Unfair competition in violation of Massachusetts Gen. Laws ch. 93A, § 11

CDS alleges that many of the Karndean products it sold were delivered to customers located in Massachusetts; accordingly, it argues that it may invoke Massachusetts chapter 93A's prohibition against unfair and deceptive trade practices. To buttress its argument that chapter

93A is applicable, CDS argues that the two "usurping" Karndean sales representatives were based in Massachusetts and that a significant portion of the business "confiscated" by Karndean involved customers located in Massachusetts. To factually support the chapter 93A elements of deception and unfairness, CDS argues:

> While Todd Gates was inviting CDS' Vice President of Marketing, Bob Thompson, to customer appreciation events into 2014, Karndean CEO Ed Perrin was sharpening the axe and waiting for Karndean's optimum time to decapitate CDS and seamlessly transition into direct sales through [the Karndean sales reps] who were already entrenched and in possession through coercion of CDS' customer information.

ECF. No. 30-1 at 15-16. CDS asserts that it built the customer base for Karndean products in New England from $10,000 in 2001 to over $2 million in 2014 and that, once CDS was "bled dry," Karndean misappropriated the entire market for itself. Following the dissolution of the working relationship, Karndean unfairly continues to profit from the display cases (worth $228,000) that CDS purchased and installed.

As a threshold matter, for conduct to transgress Massachusetts chapter 93A, a Massachusetts nexus is required: "[n]o action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth." Mass. Gen. Laws ch. 93A, § 11. To determine whether the alleged misconduct was sufficiently centered in Massachusetts, the court is directed to look to "whether the center of gravity of the circumstances that give rise to the claim is primarily and substantially within the Commonwealth." Kuwaiti Danish Comput. Co. v. Digital Equip. Corp., 781 N.E.2d 787, 799 (Mass. 2003). That product was sold in Massachusetts does not in itself make Massachusetts the "center of gravity." See Alex & Ani, LLC v. Elite Level Consulting, LLC, 31 F. Supp. 3d 365, 372 (D.R.I. 2014) (fact that merchandise was shipped

to distribution company in East Boston and sold at stores in the state insufficient to establish Massachusetts as "center of gravity").

Substantively, a violation of Massachusetts chapter 93A requires conduct that: (1) falls within "the penumbra of some common-law, statutory, or other established concept of unfairness"; (2) is characterized as "immoral, unethical, oppressive, or unscrupulous;" and (3) causes substantial injury to a consumer, competitor or other businessman. Serpa Corp. v. McWane, Inc., 199 F.3d 6, 15 (1st Cir. 1999) (quoting PMP Assocs., Inc. v. Globe Newspaper Co., 366 Mass. 593, 596 (Mass. 1975)). A distributor cannot sustain a chapter 93A claim against a manufacturer because of "a refusal to deal, without a showing of monopolistic purpose or concerted effort to hinder free trade." Serpa Corp., 199 F.3d at 16 (refusal to deal "is not an unfair trade practice under G.L.C. 93A, and is therefore not actionable"). Rather, to be actionable, the claimant must produce evidence permitting the inference that the defendant engaged in deceit or other unfair practices in its dealings with the plaintiff. Boyle v. Douglas Dynamics, LLC, 99 F. App'x 243, 247 (1st Cir. 2004).

CDS's chapter 93A claims fall short on both the "where" and the "what" axes.

To get over the "where" hurdle, CDS argues that it made the majority of its sales in Massachusetts; however, it presents no evidence to support the claim. And even if it were factually proven, the fact that the majority of sales were in Massachusetts, which happens to be the most populous of the New England states, is insufficient as a matter of law. Alex & Ani, LLC, 31 F. Supp. 3d at 372. Rather, as the statute explicitly requires, the evidence must establish that Karndean's alleged misconduct took place "primarily and substantially" in Massachusetts.

The only hard evidence of a Massachusetts nexus is the fact that Karndean's sales representatives were based in Massachusetts, although they worked with CDS staff throughout New England. K-SUF ¶¶ 27, 28. Otherwise, the material events relate to all of New England, or to Rhode Island, where CDS is incorporated and has its headquarters and warehouse. K-SUF ¶¶ 3-9. Thus, when Karndean shipped tiles to CDS, they were delivered either to the CDS warehouse in Rhode Island, or to retail stores in all six New England states. K-SUF ¶ 20. When the Karndean sales representatives made joint sales calls with CDS on customers, they went throughout New England, including to customers in Massachusetts. C-SUF ¶ 77. When CDS attended home shows, the shows were in Massachusetts, as well as in other New England states. C-SUF ¶ 78; K-SDF ¶ 78. Meetings between the two companies took place in Rhode Island, Connecticut, Massachusetts, Pennsylvania, or at trade shows around the United States. C-SDF ¶ 9. This evidence does not come close to laying the necessary foundation; I find that it is legally insufficient to satisfy the Massachusetts nexus that is essential to invoke a Massachusetts chapter 93A claim.

Even if the requisite nexus existed, CDS's substantive chapter 93A claim would fail as a matter of law because its proof does not permit the inference that Karndean's conduct violates "any common-law, statutory, or other established concept of unfairness." Serpa Corp., 199 F.3d at 15. It is undisputed that Karndean had the contractual right to terminate its business relationship with CDS, and was not prohibited from continuing to sell its products to CDS's customers. K-SUF ¶ 51. Its only arguable act of "deception" was its failure to disclose to CDS that it was considering a change in its distribution for New England until two months after the decision was finalized; with no evidence of anything obligating it to disclose sooner, that

omission cannot be labelled as deceptive or unfair.[12] See E.I. Du Pont de Nemours & Co., 517 F. Supp. 2d at 492 (withholding decision for some time that distributor was to be terminated not actionable without evidence of special relationship creating duty to disclose); Abernathy-Thomas Eng'g Co., 103 F. Supp. 2d at 609 (no duty to disclose intent to terminate beyond contractual duty to give thirty-days' notice). As such, Karndean's conduct simply does not meet the standard of "immoral, unethical, oppressive, or unscrupulous;" nor does it fall within the "penumbra" of a common-law, statutory, or other established concept of unfairness. Serpa Corp., 199 F.3d at 15.

Plaintiff's reliance on Cherick Distributors v. Polar Corp., 669 N.E.2d 218 (Mass. 1996), to support its chapter 93A claim does not turn the tide. In Cherick, the appeals court refused to overturn a jury verdict finding that a manufacturer violated chapter 93A when it terminated its exclusive relationship with a distributor with only four-days' notice. Even worse, the termination of the relationship was timed by the defendant to coincide with a meeting the plaintiff-distributor had set up with other distributors to discuss forming an association to negotiate collectively with the defendant. The court found that the jury could plausibly find that the notice was unreasonably short and infer that the termination was timed based on the improper motive of driving plaintiff out of business in order to send a chilling message to the remaining distributors. Id. at 221. CDS claims that its circumstances are similar to the Cherick plaintiff in that CDS received no notice from Karndean that the relationship was being terminated.

[12] Ironically, CDS claims there were obvious clues of what Karndean was up to in that, over many years, it was incrementally and methodically reducing its dependence on distributors, except in remote areas (for example, Alaska). C-SUF ¶¶ 71, 73. Karndean disputes that this is accurate. K-SDF ¶¶ 71-73. Whether or not it is true, CDS's perception that it was true is a reason why its claim to have been deceived that Karndean might not do the same thing in New England rings hollow.

This argument is utterly belied by the undisputed facts, starting with the fact, which CDS does not controvert, that Karndean met with CDS in Rhode Island on August 28, 2014, to advise it of Karndean's intent to take over the distribution of its product in January 2015. K-SUF ¶ 48. Karndean followed up in October with a written proposal referencing a proposed transition date of "31 December 2014." K-SUF ¶ 49 (Ex. BB). It was CDS's rejection of the proposal that terminated the relationship sooner. K-SUF ¶ 50. These undisputed facts establish that CDS was afforded the opportunity to have four-months' notice, ample time to wind up its relationship with Karndean. This distinguishes its circumstances dramatically from the four-days' notice that the jury condemned in Cherick. Further, CDS's claims of "animus" are based on no more than either Karndean's legitimate pique with CDS's poor sales and slow payment of its invoices, or its legitimate goal of altering its distribution strategy and selling directly to its New England customers. CDS presents no evidence permitting an inference of a malicious ulterior motive. By contrast, in Cherick, the evidence permitted the inference that the termination was abruptly accomplished to deter other distributors from organizing so as to strengthen their negotiating power with the defendant. Cherick would not help CDS even if chapter 93A were somehow applicable.

To summarize, I find that CDS's Massachusetts chapter 93A claim is unsupported as a matter of law, and recommend that it be summarily dismissed.

C. Count III – Unjust Enrichment

In Count III, CDS alleges that Karndean was unjustly enriched because, when it took over sales to the customers formerly sold by CDS, it got the benefit of display cases that CDS had purchased from Karndean through the rebate program and installed at the retail stores in its customer network. Karndean acknowledges that the display cases are important to the marketing

of the product. K-SUF ¶ 31. CDS claims that Karndean has been unjustly enriched by the full value of the display cases, which it alleges is $228,660.

To prevail on a claim for unjust enrichment, a plaintiff must show: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the benefit; and (3) acceptance of the benefit under circumstances where it would be inequitable for a defendant to retain the benefit without providing compensation for it. Anthony Corrado, Inc. v. Menard & Co. Bldg. Contractors, 589 A.2d 1201, 1201-02 (R.I. 1991). As the Rhode Island Supreme Court teaches, "[s]imply conferring a benefit . . . is not sufficient to establish a claim for unjust enrichment," without a showing that the enrichment to the defendant was unjust. R&B Elec. Co. v. Amco Const. Co., 471 A.2d 1351, 1356 (R.I. 1984); see Ciampi v. Zuczek, 598 F. Supp. 2d 257, 263 (D.R.I. 2009).

The problem with CDS's unjust enrichment claim is that, after CDS purchased the display cases from Karndean through the rebate program, it then sold or gave them to its customers, whose property they remain. K-SUF ¶¶ 30-33. It was CDS that controlled the terms under which the display cases were placed with its customers – CDS could have installed the cases on loan, subject to being returned or paid for by the customer if CDS stopped selling Karndean products. By contrast, the undisputed evidence establishes that Karndean has no control over display cases that are now the property of the retailer. If a retailer continues to make use of a display case it acquired from CDS (and CDS has presented no evidence establishing that this has occurred), Karndean may enjoy a benefit, but not one that can be characterized as unjust. See Ciampi, 598 F. Supp. 2d at 263 (defendant that blatantly and wrongfully enriches himself at the expense of plaintiff contrasts with incidental benefit defendant had nothing to do with creating).

Because, as a matter of law, the evidence fails to establish or permit the inference that there was any enrichment to Karndean that is unjust or inequitable, I recommend that judgment be entered against CDS on Count III.[13]

D. Count IV – Breach of Fiduciary Duty

CDS alleges that Karndean owed CDS a fiduciary duty of care in business dealings arising from Karndean's access to confidential information about CDS's commercial accounts. To support its allegation that a fiduciary relationship existed between the parties, CDS points to Karndean's dominance over CDS in their commercial dealings, illustrated by Karndean's control of pricing and its insistence on reviewing CDS's confidential customer list, and Karndean's chief executive officer's habit of referring to Karndean's relationships with distributors as "a partnership." CDS argues that Karndean's fiduciary duty was breached by its conduct in assuring CDS that the arrangement was secure, while Karndean was actually secretly plotting its "doom."

A fiduciary relationship "is one of trust and confidence and imposes the duty on the fiduciary to act with the utmost good faith." Notarantonio v. Notarantonio, 941 A.2d 138, 145 (R.I. 2008) (finding son did not owe elderly mother a fiduciary obligation in gifting transaction involving family business). In order to decide if a party owes another a fiduciary obligation, the Rhode Island Supreme Court teaches that courts should examine the size of the enterprise, participation in management decisions, and closeness of the working relationships. A. Teixeira & Co., Inc. v. Teixeira, 699 A.2d 1383, 1387 (R.I. 1997)). The determination as to whether or

[13] In its argument, CDS adds two additional theories of unjust enrichment that are missing from the Second Amended Complaint. First, it alleges that Karndean has been unjustly enriched by "the retention of approximately 500,000 square feet in future commercial 'spec' sales for commercial products that were sold by CDS" when the relationship ended. This claim is borrowed from the offset defense CDS raised to Karndean's counterclaim for goods sold and delivered. I will address it in that context, as it was raised in the pleadings; it will not be discussed as part of Count III, where it does not appear. Second, CDS charges that Karndean was unjustly enriched when it took over the customer base that CDS had developed, enjoying sales of $2.7 million in 2014 and 2015. This is CDS's tortious interference claim in different garb; I have addressed it in that context and will not address it again.

not a fiduciary relationship exists requires an analysis of the totality of the factual circumstances. T.G. Plastics Trading Co. Inc. v. Toray Plastics (Am.), Inc., 958 F. Supp. 2d 315, 327 (D.R.I. 2013). Generally, arm's length business transactions do not involve a fiduciary level of care. Indus. Gen. Corp. v. Sequoia Pac. Sys. Corp., 44 F.3d 40, 44 (1st Cir. 1995).

While CDS is right that the partners in a partnership owe each other a higher duty of care, its attempt to ground Count IV on the existence of a partnership is unavailing. A partnership may exist only where the evidence establishes an "association of two or more persons to carry on as co-owners a business for profit." R.I. Gen. Laws § 7-12-17. To qualify, the relationship must have the minimal characteristics of a single business operated for profit. Southex Exhibitions, Inc. v. R.I. Builders Ass'n, Inc., 279 F.3d 94, 100 (1st Cir. 2002) (partnership did not exist because the parties did not share profits and losses, file partnership tax returns, own property jointly, or operate under a shared name). It is well settled that the use of the word "partner" in the colloquial sense is insufficient as a matter of law to establish a legal partnership. T.G. Plastics Trading Co. Inc., 958 F. Supp. 2d at 327-28 ("The only title that fairly applies to Toray and National Plastics' relationship is that of seller and reseller."); see A. J. Amer Agency Inc. v. Astonish Results, LLC, No. C.A. 12-351 S, 2014 WL 3496964, at *28-29 (D.R.I. July 11, 2014) (summary judgment granted because reference to arm's length contractual relationship as "partnership" does not create fiduciary duty). There is no evidence that CDS and Kardean jointly shared profits or losses, held the others' ownership shares, filed taxes jointly, owned property jointly or operated under a shared name; further, it is undisputed that Karndean's use of the word "partnership" to describe its relationship with CDS is the precise colloquial banter that is legally meaningless. To the extent that Count IV rests on the existence of a partnership, it fails as a matter of law.

To save its claim, CDS relies on Abernathy-Thomas Engineering Co. v. Pall Corp., 103 F. Supp. 2d 582 (E.D.N.Y. 2000), which recognized a limited fiduciary duty springing from a long-standing (forty years) distributorship relationship in which the parties had unequal bargaining power, and which was terminated on thirty-days' notice in accordance with the strict terms of the agreement. Id. at 587, 593, 602. There are several problems with the applicability of Abernathy-Thomas Engineering to this case. First, it is based on an unusual provision of New York state law, which provides that a "distributorship agreement may, in some rare instances, create a confidential relationship out of which duty of fiduciary care arises." Id. at 602. Second, it actually recognizes a very limited fiduciary duty, arising only in connection with imposing a duty not to disclose the distributor's trade secrets (the customer list) to a third party. Id. Otherwise, Abernathy-Thomas Engineering actually rejects the claim that a seller owes a fiduciary duty to its distributor, despite a long-standing distribution relationship in which the seller dominated the distributor. Id. at 608-10.

CDS cites to no decisions from which one might conclude that the Rhode Island version of fiduciary duty would be expanded to include the relationship between the parties to an arm's length distribution agreement as in Abernathy-Thomas Engineering. Rather, the Rhode Island Supreme Court's recognition of such a duty typically arises either in relationships like a partnership where the law has long imposed a higher duty or in familial fiduciary or confidential relationships where the duty is imposed to avoid inequity. See Simpson v. Dailey, 496 A.2d 126, 128 (R.I. 1985) (fiduciary relationship existed between brother and sister who named each other as beneficiaries); Cahill v. Antonelli, 390 A.2d 936 (R.I. 1978) (brother breached fiduciary obligation by failing to convey family homestead to sister). In any event, even if the limited duty

found in Abernathy-Thomas Engineering were imposed, it would not help CDS because Karndean did not disclose CDS's customer list to any third party.

Based on the foregoing, I conclude that CDS has failed to present any evidence from which a fact finder might conclude that it was owed a duty of fiduciary care by Karndean. Consequently, I find that CDS's claim for a breach of fiduciary duty is insufficiently supported, as a matter of law. Therefore, I recommend that Karndean's motion for summary judgment on Count IV of CDS's complaint be granted.

E. Karndean's Counterclaims

Karndean has moved for summary judgment on its two counterclaims against CDS. Buttressed by a detailed confidential declaration establishing that all open rebates and credits were netted out in calculating the final figure, ECF No. 25, Karndean asserts, and CDS does not dispute, that CDS ordered floor tiles during September, October and November of 2014, all of which were delivered to CDS, but CDS failed to pay, totaling a net due of $181,995. K-SUF ¶¶ 25, 26. In Count I of its counterclaim, Karndean relies on Rhode Island's Uniform Commercial Code - Sales, R.I. Gen. Laws § 6A-2-101 *et seq.*, which requires, *inter alia*, payment for delivered and accepted goods within thirty days. Count I also seeks recovery of interest and attorney's fees pursuant to the Terms and Conditions. ECF No. 25-23 at 99, 102 §§ 5.7 5.9. Count II of Karndean's counterclaim alleges in the alternative that CDS was unjustly enriched when it kept the tiles and refused to pay for them.

While not disputing that it ordered and received the tiles yet failed to pay, CDS argues that the amount it owes should be offset for two reasons: first, by the cost of the Karndean displays that it bought with the Karndean rebate money; and, second, by commissions or profits due to it for future "presold" commercial "spec" purchases. Karndean responds that a right of

offset cannot bar summary judgment on payment obligations unless those obligations and the claimed offsets involve "contractually 'dependent' promises." Pereira v. Cogan, 267 B.R. 500, 507-08 (S.D.N.Y. 2001) (no right to offset payments due on promissory notes at summary judgment with monies allegedly owed for salary and severance because offset claims were unrelated to indebtedness); see Omark Indus. v. Lubanko Tool Co., 266 F.2d 540 (2d Cir. 1959) (summary judgment granted on book account; judgment stayed while separate counterclaims for breach of franchise agreement were resolved). CDS also disputes any recovery based on the Terms and Conditions to which it claims it never agreed.

Starting with the last point, there is unquestionably a trial-worthy issue whether Karndean is entitled to interest and attorney's fees in connection with its recovery under Count I pursuant to the Terms and Conditions. These terms are set out in an unsigned document that was emailed to CDS; the evidence on whether it was ever accepted is ambiguous. As to the displays, with no substantive right to be paid for them under the doctrine of unjust enrichment, CDS's offset argument fails as a matter of law. However, CDS's claim that Karndean was able to collect for sales that were in the pipeline, arranged by CDS but closed by Karndean, yet it paid CDS no compensation for them, is a very different matter. C-SUF ¶ 105 (CDS not compensated for "500,000 square feet of future commercial 'spec' purchases that were sold by CDS"). This claim may well relate to the precise product that is the subject of Karndean's counterclaim, eliminating Karndean's objection that an offset may be raised as a defense only if it involves "contractually 'dependent' promises." Whether some adjustment is appropriate will depend on whether the parties made some agreement, which is unclear from the facts presented. See Bruno Int'l Ltd. v. Vicor Corp., No. CV 14-10037-DPW, 2015 WL 5447652, at *10 (D. Mass. Sept. 16, 2015) (damages appropriate when seller did not pay distributor commissions on sales that it had already

completed prior to termination). In addition, whether the Terms and Conditions were accepted and are controlling is another material but disputed fact; if applicable, they could contractually bar CDS from exercising any set-off right. ECF No. 25-23 at 81, 84 § 5.5; ECF No. 25-23 at 99, § 5.5. It is also fodder for a fact finder whether the lack of compensation for the sales in the pipeline is inequitable; thus, this factual dispute also affects Karndean's claim in Count II for unjust enrichment.

Based on the foregoing, I recommend that Karndean's motion for summary judgment on its counterclaims be granted as to liability for $181, 995, but denied as to the amount of damages so that a fact finder may consider, as to Count I, whether Karndean should be awarded interest and attorney's fees pursuant to the Terms and Conditions and, as to both Counts, whether there should be an offset to compensate CDS for its work in making sales that were ultimately closed by Karndean after the relationship was terminated.

IV. CONCLUSION

Based on the foregoing, I recommend that Defendant Karndean International, LLC's motion for summary judgment (ECF No. 22) on CDS, Inc.'s Second Amended Complaint (ECF No. 14) be GRANTED. I recommend further that Defendant's motion for summary judgment on its counterclaims (ECF No. 15) be GRANTED IN PART as to liability for $181,995 only, but DENIED as to calculation of the amount of damages.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to

appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
March 17, 2017